in *Francis v. Municipal Councillors of Kuala Lumpur*[6] on page 410 is germane:—

"In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court."

Another consideration is that a claim for wrongful dismissal is limited to compensation for loss of emoluments which would have been earned but for the breach and which would include compensation for the loss of the use of the premises, and possibly a compensation in respect of the time which might have reasonably elapsed before the respondent can obtain employment (*Addis v. Gramophone Co. Ltd.*[7]).

In the light of all the relevant circumstances including the onus of proof which lies upon each of the plaintiffs in the two cases as contradistinct from the case of *Thomson v. The South Eastern Railway Co. supra*, where the substantial burden of proof of the whole lies upon the railway company, I consider the fairest mode of trying the several disputes which exist between the parties is that the board should be at liberty to proceed with its claim in the court below. Much of the consideration in the court below was dominated by the question that the points raised in both the pleadings are similar in nature. That is a wrong approach to the whole problem. It seems to me plain that the learned president had acted on some wrong principle. That was a wrong exercise of discretion. To bring the point home it must be re-stated that a stay of proceedings is a discretionary remedy to be exercised in accordance with well established judicial principles and that includes the principle that it should not cause injustice to the plaintiff.

I will therefore allow the appeal with costs. I further direct that the case before the lower court be tried as speedily as possible.

Appeal allowed.

Solicitors: *Skrine & Co.; Joginder & Rajadurai.*

LIOW SIOW LONG v. PUBLIC PROSECUTOR

[A.CrJ. (Raja Azlan Shah J.) August 8, 1969]

[Kuala Lumpur—Criminal Appeal No. 3 of 1969]

Road Traffic — Reckless driving — Sentence — Disqualification — Special grounds — Road Traffic Ordinance, 1958, s. 34A.

Evidence — Testimony of close relations — Competent witnesses.

Criminal Law and Procedure — Sentence — Extenuating circumstances — Consideration of.

This was an appeal against the conviction of the appellant on a charge of causing death by reckless driving under section 34A of the Road Traffic Ordinance, 1958. The appellant was sentenced to 6 months imprisonment and also disqualified from holding or obtaining a driving licence for 5 years. It was submitted on appeal that there was no evidence of reckless driving by the appellant.

Held, dismissing the appeal: (1) to bring home a charge under section 34A of the Road Traffic Ordinance in respect of driving recklessly it must be shown that the driving was such as to amount to rash driving and the driver of the vehicle must be heedless of the state of affairs on the road at the time in question;

(2) on the facts the learned president in this case was right in convicting the appellant; and as there was nothing to show that the sentence imposed was excessive, the appeal would be dismissed.

Case referred to:—

(1) *Seah Siak How* v. *Public Prosecutor* [1965] 1 M.L.J. 53.

MAGISTRATE'S CRIMINAL APPEAL.

Kam Woon Wah for the appellant.

Lim Beng Chooi (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): On the 24th of January 1969 the appellant was convicted of an offence of causing death by reckless driving under section 34A of the Road Traffic Ordinance, 1958 and was sentenced to six months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of 5 years.

The only substantial ground of appeal is that the conviction was wholly against the weight of evidence as there was no evidence of reckless driving by the appellant.

The short facts as found by the learned president are as follows:—

On the 20th of March 1967 at about 5.50 a.m. P.W.1 and one San Yat Pah (one of the deceased persons) were travelling in a motor car M. 5395 being driven by one Lee Choo Chai, another of the deceased, from Kuala Lumpur to Betong. P.W.1 was seated at the back. It was still dark and the motor car had its headlights on. While it was travelling at 35 miles per hour at 2nd milestone Betong/Kuala Lumpur Road a motor lorry came from the opposite direction with its headlights on. It came at a fast speed and it also encroached into the path of the said car. As a result of this encroachment a collision occurred between the two vehicles and as a result San Yat Pah and Lee Choo Chai died on the spot.

In coming to the finding of fact the learned president relied on the evidence of P.W.1, P.W.2, P.W.3 and P.W.9.

P.W.1 testified that the motor lorry encroached on to his side of the road and knocked into his car and after that he lost consciousness. He said that the lorry had encroached about 4 feet on his side of the road. The lorry had its headlights on. It did not dip its headlights. The lorry was travelling at speed. His evidence had been attacked on the sole ground that he is an interested witness because it so happened that he was a brother of the two deceased persons. It is difficult to accept that suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, e.g. they are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon. In my view the circumstance relied upon by counsel is not sufficient to cast any doubt on the evidence of P.W.1, who is not proved to be inimical to the appellant.

P.W.2 said that the accident took place some 50 yards ahead of him. He did not see the impact because as soon as the collision took place there were no more lights coming from both the vehicles.

P.W.3 who was a weeder also saw the accident. At the crucial time she was cycling on her correct side of the road towards the direction of Kuala Lumpur. The lorry driven by the appellant passed her. It was then travelling about 4 — 5 feet from her. Its headlights were not dipped. She then heard the sound of a collision about 40 feet behind her and she looked back. She saw the lorry was driven to the edge of the road. It had moved to its left hand side. Her evidence is virtually uncontroverted. Under such circumstances it is inconceivable that the witness, who had no reason for false implication could have deposed against the appellant on any other ground save her own experience of having witnessed the accident.

P.W.9, the Police witness, found broken pieces of glass on the left hand side of the road as one faces Kuala Lumpur. There were also a few pieces of red glass which came from motor car M. 5395. The distance between this spot and the edge of the road is 6 feet. P.W.9 said that the width of the road is 17′ 4″. The width of the lorry is 7′ 5″ and the width of the motor car was 4′ 3″.

P.W.7 who at the time was driving his lorry BD 965 from Ketari to Kuala Lumpur testified that it was still dark and at that time there was a lot of mist and he had his headlights dipped. He said he kept to his correct side of the road as there were cyclists going to work. He drove past them.

On his finding of fact the learned president held there was a *prima facie* case under section 34A of the Road Traffic Ordinance. Section 34A was introduced to make specific provisions in the Road Traffic Ordinance dealing with offences of causing death by reckless or dangerous driving. Hitherto prosecutions in respect of deaths resulting from the use of motor vehicles had always been instituted under section 304A of the Penal Code.

The word "reckless" has been given a judicial definition in the recent case of *Seah Siak How v. Public Prosecutor*.[1] The learned Chief Justice of Singapore under section 26(1) of their Road Traffic Ordinance, 1961 which is in *pari materia* to our section 34A said:—

> "To bring home a charge under section 26 in respect of driving recklessly it must be shown that the driving is such as to amount to rash driving and the driver of the vehicle in question must be heedless of the state of affairs on the road at the time in question."

I agree with and for the purpose of this judgment adopt the statement of law propounded by the learned Chief Justice. In my view, the word "reckless" in section 34A must be left to bear its full meaning and be construed as covering a case of rash driving in circumstances where the driver is indifferent as to the consequences of his act. Carelessness may not be sufficient to constitute recklessness though it is a factor to be taken into account.

In the present case the appellant was driving an empty timber lorry with trailer along the main Kuala Lumpur/Betong Road at about 5.50 a.m. It was still dark and there was a lot of mist on the road. It had its headlights on. When it came to the 2nd milestone Betong/Kuala Lumpur Road, which was a fairly straight road, it came into head-on collision with an on-coming motor car which was on its correct side of the road. In other words the accident occurred on the lorry's wrong side of the road. The motor car was a total wreck. The lorry was damaged on its front offside mudguard and bumper. In my view that could only have happened as a result of a violent impact between the two vehicles. As a result of the collision the driver of the motor car and a passenger who was sitting by his side died on the spot. The learned president found as a fact that the lorry was travelling at a speed and on the wrong side of the road. There were rubber tappers on the road cycling to their place of work. The driver of the lorry (the appellant) saw the oncoming car along that straight stretch of road but he failed to dip

its headlights, check its speed or take proper care not to encroach on the wrong side of the road. There was a heavy mist on the road which affected visibility. After reviewing the evidence the learned president came to the conclusion that his action was rash, having complete disregard for the safety to the people in the motor car. He accepted the evidence of the prosecution witnesses. I do not find any material on which this court can say that he was wrong or that he misdirected himself on the facts. I am also satisfied that the evidence justified the conclusion he had arrived at. I am therefore not disposed to interfere with his finding of guilt under section 34A of the Road Traffic Ordinance. The appeal against conviction is dismissed.

I now come to the question of sentence. The learned president correctly appreciated that the offence was serious and he did reflect this degree of seriousness in the sentence he imposed. It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case. The only consideration which can be urged for reduction of sentence is that it is manifestly excessive, all other factors are irrelevant. The extenuating circumstances put forward on behalf of the appellant was that the 5 year period of disqualification might deprive him of his means of livelihood. That in my view is not an extenuating circumstance. No special grounds have been advanced so as to justify any reduction in the period of disqualification. In my view the learned president had properly directed himself with regard to sentence. The appeal against sentence is also dismissed.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.*

KHO AH SOON v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) August 16, 1969]

[Penang — Criminal Appeal No. 13 of 1969]

Criminal Law and Procedure — Charge — Possession of false car registration card — Omission of words "intent to deceive" — Whether fatal — No failure of justice — Criminal Procedure Code (Cap. 21), ss. 162 and 448.

Criminal Law and Procedure — Sentence — Sentence increased on appeal.

Road Traffic — Registration card — Possession of false registration card — Charge — Omission of words "intent to deceive" in charge — Whether fatal — Road Traffic Ordinance, 1958, s. 137(3).

This was an appeal against the conviction of the appellant on a charge for an offence under section 137 of the Road Traffic Ordinance, 1958. The charge on which he was convicted was as follows: "That you on the 6th day of December, 1968 at about 11.15 a.m. at Jalan Lunas, in the District of Bukit Mertajam, in the State of Penang, did have in your possession a document, to wit a Motor Vehicle registration card purporting to be pertaining to car number PG. 9565, so closely resembling the original registration card of the above mentioned car as to be calculated to deceive and that you have thereby committed an offence under section 137(3)(b) of the Road Traffic Ordinance No. 48 of 1958 and punishable under section 137(3) of the said Ordinance."

The appellant was found guilty and sentenced to pay a fine of $250 in default 3 months imprisonment. The main ground of appeal was that the words "with intent to deceive" were omitted from the charge.

Held, dismissing the appeal: (1) the omission of the words "with intent to deceive" did not cause any failure of justice and therefore the conviction would be upheld;

(2) the sentence imposed in this case was inadequate and should be increased to a term of imprisonment for 6 months.

Cases referred to:—

(1) *R.* v. *Greenberg* [1942] 2 All E.R. 344.

(2) *Public Prosecutor* v. *Leong Yoon Meow* [1953] M.L.J. xxxv.

(3) *R.* v. *McVitie* (1960), 44 Cr. App. R. 201; [1960] 2 Q.B. 483; [1960] 3 W.L.R. 99; [1960] 2 All E.R. 498.

(4) *R.* v. *Thomson* (1913), 9 Cr. App. R. 252 at p. 260; [1914] 2 K.B. 99 at p. 105.

MAGISTRATE'S CRIMINAL APPEAL.

Tan Phock Kin for the appellant.

Abu Mansor bin Ali (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J. (delivering oral judgment):- The appellant was charged in the Magistrate's Court at Bukit Mertajam and convicted on the 29th May, 1969 on the charge as follows:—

"That you on the 6th day of December, 1968 at about 11.15 a.m. at Jalan Lunas, in the District of Bukit Mertajam, in the State of Penang, did have in your possession a document, to wit, a Motor Vehicle registration card purporting to be pertaining to car number PG. 9565, so closely resembling the original registration card of the above mentioned car as to be calculated to deceive and that you have thereby committed an offence under section 137(3)(b) of the Road Traffic Ordinance No. 48 of 1958 and punishable under section 137(3) of the said Ordinance."

and was sentenced to pay a fine of $250 in default 3 months' imprisonment. He appeals against the conviction.

The facts briefly are that appellant was stopped on 6th December, 1968 in a car PG. 9565 driven by one Abdullah bin Ismail (offered